ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF WEST VIRGINIA, *et al.*,	)	
	)	
Petitioners,	)	
	)	
v.	)	
	)	No. 24-1120
UNITED STATES	)	(and consolidated cases)
ENVIRONMENTAL	)	
PROTECTION AGENCY, *et al.*,	)	
	)	
Respondents.	)	
	)	

STATE PETITIONERS' AND NRECA'S RESPONSE TO RESPONDENTS' MOTION TO ALIGN STAY MOTION BRIEFING SCHEDULES AND FOR LEAVE TO FILE A COMBINED RESPONSE ON JUNE 11, 2024

In a largely *unopposed* motion about procedural matters related to stay motions, Respondents have collaterally attacked the State Petitioners' request for an administrative stay and conclusorily argued that the Petitioners are not suffering any immediate, irreparable harm. Mot.6 & n.5. The Court should ignore what EPA has said on those points, as EPA's arguments constitute an unusual and improper attempt to litigate substantive issues in the guise of a procedural filing. But in any event, EPA's remarks only confirm how it fundamentally misunderstands the consequences of its own Rule.

As the States said in their motion (which EPA now ignores), the scope and complexity of this Rule will require States to take *immediate* action to comply. *See* States' Stay Mot. ("States.Stay") at 16-20. To meet EPA's mandates, States must start planning, gathering information, analyzing, modeling, coordinating, drafting, and seeking appropriate signoffs right now. *See, e.g.*, States.Stay.Ex.3, Osborne.Decl. ¶¶11-13 (explaining why the long process of fashioning state plans will require an Arkansas state regulator to act "immediately"). States.Stay.Ex.4, Webb.Decl. ¶7 ("[T]he installation of new equipment and construction timelines will require immediate decisions."); States.Stay.Ex.5, Boylan.Decl. ¶3 ("This [compliance] work will need to start immediately following the promulgation of the Rule in order to meet EPA's aggressive deadlines."); States.Stay.Ex.22, Stegmann.Decl. ¶21 ("[T]he Final Rule will require ODEQ and other state agencies to immediately invest a great amount of time, effort, and resources to develop a state plan."); States.Stay.Ex.28, Crowder.Decl. ¶18 ("To comply with the Final Rule's state-plan timeline, the WVDAQ will have to begin working—i.e., expending resources—immediately."); States.Stay.Ex.30, Lane.Decl ¶8 ("The PSCWV would have to commit ratepayer dollars for massive expenditures almost immediately with no assurance that the plants could obtain firm pipeline

capacity, construct new pipeline capacity, or obtain necessary firm gas supplies by 2029."); States.Stay.Ex.31, Parfitt.Decl. ¶4 ("[I]mplementing the rule presents a complicated endeavor necessitating immediate investment of significant Department resources."). All these efforts create unrecoverable costs, threaten irreversible and detrimental changes to the power system, and undermine the States' sovereign discretion. And EPA's own logic on these harms is self-defeating: if it were right that nothing needs to happen right away, then why would it *oppose* an administrative stay during even that purportedly quiet period?

The States are not alone in being immediately injured by the Rule, as the Rule is already directly affecting private entities, too. *See* Nat'l Rural Elec. Coop. Ass'n Stay Mot. ("NRECA.Stay") at 20; *see also* NRECA.Stay.Ex.B, McCollam.Decl. ¶30 ("Basin Electric must immediately begin spending money across a variety of expense categories."); NRECA.Stay.Ex.C, Purvis.Decl. ¶18 ("[S]ources must immediately conduct resource-planning analyses to inform State plan elections."); *id.* ¶46 ("[A] pipeline operator must begin design, permitting, siting, procurement, and construction immediately to have natural gas available in time for the Final Rule's 2030 deadline."); NRECA.Stay.Ex.D, McLennan.Decl. ¶¶75-88

(explaining the many ways in which "Minnkota will suffer immediate irreparable harm"); NRECA.Stay.Ex.J, Hochstetler.Decl. ¶24 ("It is critically important that South Carolina's utilities move forward immediately with efforts to construct new combined cycle units."); States.Stay.Ex.20, Tschider.Decl. ¶4 ("Rainbow's ability to comply with the rule within the allotted timeframe is uncertain and that uncertainty inflicts immediate significant harm by chilling Rainbow's ability to generate revenue *now*."). None of that should surprise EPA. It conceded in the Rule itself that at least "feasibility work" on "each component of [carbon capture and sequestration] (capture, transport, and storage)" would need to start in "June 2024." 89 Fed. Reg. 39798, 39874 (May 9, 2024). The facts have shown, though, that the situation is much worse than that.

In short, although now EPA fixates on dates drawn from the Rule, the on-the-ground facts described by real-world regulators and energy experts show that legal effective dates and deadlines are largely beside the point here. That's why we're not "years away" from anything. Mot.6 n.5. The States agreed to EPA's proposed schedule precisely *because* it offered the fastest path to a resolution (and with it, avoidance of these harms). And recall, too, that EPA raised some of these same arguments in opposition to applications

to stay an earlier iteration of this same regulatory effort. *See* EPA Opp. To Appls. For Immediate Stay at 53-54, 58-60, *West Virginia v. EPA*, No. 15A773 (filed Feb. 4, 2016) (arguing that stay applicants, including the States, had not shown "near-term effects" from the Clean Power Plan given later compliance deadlines). But the Supreme Court entered a stay back then anyway. *West Virginia v. EPA*, 577 U.S. 1126, 1126 (2016). This Court should do the same now.

As for word count, the Court should reject the EPA's "sky's the limit" approach. The States, NRECA, and others suggested a reasonable word limit that's slightly over the word limit for full merits briefs. That word limit reflects the efficiencies that EPA will enjoy from filing a consolidated response brief; for example, it won't need to write multiple statements of the case, standards of review, and more. And the proposal is consistent with the Court's practice. Take *Utah v. EPA*, a recent case that EPA mentions. *See* Mot.3 n1. There, the Court required EPA to respond to *six* stay motions in a 14,300-word brief. *See* Order, *Utah v. EPA*, No. 23-1202 (D.C. Cir. Aug. 10, 2023). Surely, then, EPA can respond to the *four* anticipated stay motions here with very nearly the same number of words as it had in *Utah*.

For all these reasons, the Court should order EPA to file by June 11 a consolidated response of no more than 13,500 words to any stay motions filed before May 24.

Respectfully submitted,

THEODORE E. ROKITA
ATTORNEY GENERAL

/s/ James A. Barta
James A. Barta
Solicitor General

Office of the Attorney General of Indiana
302 W. Washington St.
Indianapolis, IN 46204
Phone: (317) 232-0709
james.barta@atg.in.gov

Counsel for State of Indiana

PATRICK MORRISEY
ATTORNEY GENERAL

/s/ Michael R. Williams
Lindsay S. See
Solicitor General
Michael R. Williams
Principal Deputy Solicitor General
Counsel of Record
Frank A. Dame
Assistant Solicitor General

Office of the Attorney General of West Virginia
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25301
(304) 558-2021
michael.r.williams@wvago.gov

Counsel for State of West Virginia

STEVE MARSHALL
Attorney General

/s/ Edmund G. LaCour Jr.
Edmund G. LaCour Jr.
Solicitor General

Office of the Attorney General
State of Alabama
501 Washington Avenue
P.O. Box 300152
Montgomery, AL 36130-0152
(334) 242-7300
Edmund.LaCour@AlabamaAG.gov

Counsel for State of Alabama

TREG TAYLOR
Attorney General

/s/ Garrison Todd
Garrison Todd
Assistant Attorney General

Alaska Department of Law
1031 W. 4th Ave., Ste. 200
Anchorage, AK 99501
(907) 269-5100
garrison.todd@alaska.gov

Counsel for State of Alaska

TIM GRIFFIN
Attorney General

/s/ Nicholas J. Bronni
Nicholas J. Bronni
Solicitor General
Dylan Jacobs
Deputy Solicitor General

Office of the Arkansas Attorney General
323 Center Street, Suite 200
Little Rock, AR 72201
(501) 682-2007 (main)
Nicholas.Bronni@ArkansasAG.gov
Dylan.Jacobs@ArkansasAG.gov

Counsel for State of Arkansas

ASHLEY MOODY
Attorney General

/s Henry C. Whitaker
Henry C. Whitaker
Solicitor General
James H. Percival
Chief of Staff

Office of the Attorney General
The Capitol, Pl-01
Tallahassee, Florida 32399-1050
(850) 414-3300
(850) 410-2672 (fax)
henry.whitaker@myfloridalegal.com
james.percival@myfloridalegal.com

Counsel for State of Florida

CHRISTOPHER M. CARR
ATTORNEY GENERAL

/s/ Stephen J. Petrany
Stephen J. Petrany
Solicitor General

Office of the Attorney General of Georgia
40 Capitol Square, SW
Atlanta, GA 30334
(404) 458-3408
spetrany@law.ga.gov

Counsel for State of Georgia

RAÚL R. LABRADOR
ATTORNEY GENERAL

/s/ Joshua N. Turner
Joshua N. Turner
Chief of Constitutional Litigation and Policy
Alan M. Hurst
Solicitor General

Office of the Idaho Attorney General
P.O. Box 83720
Boise, ID 83720-0010
Tel: (208) 334-2400
Josh.Turner@ag.idaho.gov
Alan.Hurst@ag.idaho.gov

Counsel for State of Idaho

BRENNA BIRD
ATTORNEY GENERAL

/s/ Eric H. Wessan
Eric H. Wessan
Solicitor General

Office of the Attorney General of Iowa
1305 E. Walnut Street
Des Moines, IA 50319
(515) 823-9117
(515) 281-4209 (fax)
eric.wessan@ag.iowa.gov

Counsel for State of Iowa

RUSSELL COLEMAN
ATTORNEY GENERAL

/s/ Matthew F. Kuhn
Matthew F. Kuhn
Solicitor General
Jacob M. Abrahamson
Counsel for Special Litigation

Office of Kentucky Attorney General
700 Capital Avenue, Suite 118
Frankfort, KY 40601
(502) 696-5300
Matt.Kuhn@ky.gov
Jacob.Abrahamson@ky.gov

Counsel for the Commonwealth of Kentucky

LIZ MURRILL
ATTORNEY GENERAL

/s/ J. Benjamin Aguiñaga
J. Benjamin Aguiñaga
Solicitor General
Tracy Short
Assistant Attorney General

Louisiana Department of Justice
1885 N. Third Street
Baton Rouge, LA 70804
(225) 326-6766
aguinagaj@ag.louisiana.gov
shortt@ag.louisiana.gov

Counsel for State of Louisiana

LYNN FITCH
ATTORNEY GENERAL

/s/ Justin L. Matheny
Justin L. Matheny
Deputy Solicitor General

Office of the Mississippi Attorney General
P.O. Box 220
Jackson, MS 39205-0220
(601) 359-3825
justin.matheny@ago.ms.gov

Counsel for State of Mississippi

ANDREW BAILEY
ATTORNEY GENERAL

/s/ Joshua M. Divine
Joshua M. Divine
Solicitor General

Missouri Attorney General's Office
Post Office Box 899
Jefferson City, MO 65102
Tel. (573) 751-1800
Fax. (573) 751-0774
josh.divine@ago.mo.gov

Counsel for State of Missouri

AUSTIN KNUDSEN
ATTORNEY GENERAL

/s/ Christian B. Corrigan
Christian B. Corrigan
Solicitor General
Peter M. Torstensen, Jr.
Deputy Solicitor General

Montana Department of Justice
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026
christian.corrigan@mt.gov
peter.torstensen@mt.gov

Counsel for State of Montana

MICHAEL T. HILGERS
ATTORNEY GENERAL

/s/ Zachary A. Viglianco
Zachary A. Viglianco
Deputy Solicitor General

Office of the Attorney General of Nebraska
2115 State Capitol
Lincoln, NE 68509
(531) 739-7645
zachary.viglianco@nebraska.gov

Counsel for State of Nebraska

JOHN FORMELLA
ATTORNEY GENERAL

/s/ Mark W. Dell'Orfano
Mark W. Dell'Orfano
Assistant Attorney General

New Hampshire Department of Justice
1 Granite Place South
Concord, New Hampshire 03301-3271
(603) 271-1236
Mark.W.DellOrfano@doj.nh.gov

Counsel for State of New Hampshire

DREW H. WRIGLEY
ATTORNEY GENERAL

/s/ Philip Axt
Philip Axt
Solicitor General

Office of Attorney General of North Dakota
600 E. Boulevard Ave., Dept. 125
Bismarck, ND 58505
(701) 328-2210
pjaxt@nd.gov

Counsel for State of North Dakota

GENTNER DRUMMOND
ATTORNEY GENERAL

/s/ Garry M. Gaskins, II
Garry M. Gaskins, II
Solicitor General
Jennifer L. Lewis
Deputy Attorney General

Office of the Attorney General of Oklahoma
313 NE Twenty-First St.
Oklahoma City, OK 73105
(405) 521-3921
garry.gaskins@oag.ok.gov

Counsel for State of Oklahoma

ALAN WILSON
ATTORNEY GENERAL

Robert D. Cook
Solicitor General

/s/ J. Emory Smith, Jr.
J. Emory Smith, Jr.
Deputy Solicitor General
Thomas T. Hydrick
Assistant Deputy Solicitor General
Joseph D. Spate
Assistant Deputy Solicitor General

Office of the Attorney General of South Carolina
1000 Assembly Street
Columbia, SC 29201
(803) 734-3371
josephspate@scag.gov

Counsel for State of South Carolina

MARTY J. JACKLEY
ATTORNEY GENERAL

/s/ Steven Blair
Steven Blair
Deputy Attorney General

South Dakota Attorney General's Office
1302 E. Highway 14, Suite 1
Pierre, SD 57501
(605) 773-3215
atgservice@state.sd.us

Counsel for State of South Dakota

JONATHAN SKRMETTI
Attorney General and
Reporter

/s/ J. Matthew Rice
J. Matthew Rice
Solicitor General
Whitney Hermandorfer
Director of Strategic Litigation

Office of the Attorney General and
Reporter of Tennessee
P.O. Box 20207
Nashville, TN 37202-0207
(615) 741-7403
Matt.Rice@ag.tn.gov
Whitney.Hermandorfer@ag.tn.gov

Counsel for State of Tennessee

KEN PAXTON
Attorney General

Brent Webster
First Assistant Attorney General

James Lloyd
Deputy Attorney General for Civil Litigation

Kellie E. Billings-Ray
Chief, Environmental Protection Division

/s/ Wesley S. Williams
Wesley S. Williams
Assistant Attorney General

Office of the Attorney General of
Texas
Environmental Protection Division
P.O. Box 12548, MC-066
Austin, Texas 78711-2548
(512) 463-2012 | Fax: (512) 320-0911
Wesley.Williams@oag.texas.gov

Counsel for State of Texas

SEAN REYES
ATTORNEY GENERAL

/s/ Stanford E. Purser
Stanford E. Purser
Solicitor General

Office of the Utah Attorney General
160 E. 300 S., 5th Floor
Salt Lake City, Utah 84111
385-382-4334
spurser@agutah.gov

Counsel for State of Utah

JASON MIYARES
ATTORNEY GENERAL

/s/ Erika L. Maley
Erika L. Maley
Solicitor General
Kevin M. Gallagher
Principal Deputy Solicitor General
Brendan T. Chestnut
Deputy Solicitor General

Virginia Attorney General's Office
202 North 9th Street
Richmond, VA 23219
(804) 786-2071
emaley@oag.state.va.us
kgallagher@oag.state.va.us
bchestnut@oag.state.va.us

Counsel for Commonwealth of Virginia

BRIDGET HILL
ATTORNEY GENERAL

/s/ D. David DeWald
D. David DeWald
Deputy Attorney General

Office of the Attorney General of Wyoming
109 State Capitol
Cheyenne, WY 82002
(307) 777-7895
david.dewald@wyo.gov

Counsel for State of Wyoming

/s/ Scott A. Keller

Scott A. Keller
Counsel of Record
Steven P. Lehotsky
Michael B. Schon
Lehotsky Keller Cohn LLP
200 Massachusetts Ave. NW, Suite 700
Washington, DC 20001
(512) 693-8350
scott@lkcfirm.com

Mithun Mansinghani
Lehotsky Keller Cohn LLP
619 W. Main St.
Oklahoma City, OK 73102

Joshua P. Morrow
Lehotsky Keller Cohn LLP
408 W. 11th St., 5th Floor
Austin, TX 78701

Dated: May 16, 2024

CERTIFICATE OF COMPLIANCE

I certify that this response complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 920 words, excluding the parts exempted by Fed. R. App. P. 32(f).

I also certify that this brief complies with the requirements of Fed. R. App. P. 27(d)(1)(E), 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point CenturyExpd BT font.

/s/ Michael R. Williams
Michael R. Williams